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Supreme Court of the United States

OCTOBER TERM—1931.

No. 200 No. 201

HARRY M. BLACKMER,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States,

OCTOBER TERM—1931.

No..... No.....

HARRY M. BLACKMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRITS OF CERTIORARI.

To the Honorable, Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Preliminary.

In 1924, petitioner retired from business, left the United States, took up his residence in the City of Paris, Republic of France, and has not since returned to this country (R., 5131, pp. 18, 19; R., 5132, pp. 16-19). There is no allegation in the Record that the testimony desired from petitioner was ever given to any grand jury, or to any attorney for the Government, or was other than conjectured.

In May, 1925, Harry F. Sinclair, and Albert B. Fall were indicted by a Federal Grand Jury for the District of Columbia for conspiracy to defraud the United States,

were both thereafter arrested, and the case was docketed in the Supreme Court of the District of Columbia as Criminal No. 43324 (R., 5131, pp. 1-3; R., 5132, pp. 1-3).

History of the Act—Its Special Purpose.

From the report of the Committee on Public Lands and Surveys in charge of the Teapot Dome inquiry (Cong. Rec., May 29, 1928, page 10,520):

> "Blackmer (petitioner herein) and * * * (another citizen) were and are still abroad, subject to a penalty of one hundred thousand dollars for failing to respond to a subpoena to attend the criminal trial in the District, a law to that effect having been enacted to enforce their appearance." (Our parentheses.)

From the statements of the Senate and House Committee Chairmen in charge of the bill while under debate in Congress:

> In the Senate:
>
> "Mr. Walsh: Mr. President, it will be recalled that the affairs of the Continental Trading Co. became the subject of inquiry in the suit brought by the Government of the United States against the Sinclair Co. in the State of Wyoming. The testimony of certain witnesses was desired, but they found it convenient to be in Europe at the time. * * * I introduce the bill, which I send to the desk, in order to meet that situation and ask that it may be read" (Cong. Rec., Vol. 67, part 1, p. 613).
>
> In the House:
>
> "Mr. Graham: * * * I may say to the House that it is no secret that the primary object of this measure is to bring back from France two witnesses who are regarded as very material and important witnesses in the prosecution of the cases, civil and criminal, which arose out of the Teapot Dome oil scandal. (Applause.) * * * (Cong. Record, Vol. 67, No. 172, pp. 12,816-7).

The Act.

On July 3, 1926, the Act of Congress in question was approved (Act of July 3, 1926, c. 762; U. S. C. Tit. 28, Secs. 711-718 inc.). It is hereinafter referred to as "the Act".

Section 1 of the Act applies to civil cases, and provides that whenever a citizen of the United States, or a person domiciled therein, shall not appear to answer, or having appeared, shall not answer, any question propounded to him under letters rogatory issued out of a United States court, such court may order the issuance of a subpoena for such witness to be sent to a United States Consul within the country where the desired witness may be. By later sections of the Act it appears that the service, the punishment for disobeying, etc., are the same as in the case of a *Section 2* subpoena issuing out of criminal actions (Act, Sec. 3, *et seq.*).

Section 2 authorizes United States courts, in criminal cases, upon "proper showing" of the Attorney General or any assistant or district attorney acting under him, to issue and to have United States Consuls serve witness-subpoenas (after first tendering necessary travel and attendance expenses) upon citizens of the United States, or persons domiciled therein, who are "beyond the jurisdiction of the United States."

The right to such extra-territorial subpoenas is withheld from the defendant in criminal actions (Act., Sec. 2). There is no requirement that the subpoenas shall carry notice that they issued under authority of the Act (see Act).

Section 4 provides that if the command of the subpoena should not be obeyed, the Court shall issue an Order to Show Cause directing the disobedient person to

appear before such court, at a time in such order designated, to show cause why he should not be adjudged guilty of contempt and be punished accordingly (Act, Sec. 4).

As to a disobedient property owner, the Act provides that the Order to Show Cause may direct the unlimited sequestration of his property in the United States which shall be held to satisfy any judgment that may be rendered against him in the proceeding so instituted (Act, Sec. 5). The Act contains no provision for making property "offending", nor does it contain any provision under which the Government could possibly have a money claim against defendant, or a property dispute with him at the time of the sequestration. Nor does the Act attempt to destroy the presumption of innocence (which necessarily carries with it the presumption that there will be no fine to satisfy) prevailing in criminal contempt actions.

Section 6 provides that *after* the marshal has seized and levied upon the property, a copy of the Order to Show Cause shall be forwarded by the marshal to "the Consul of any country" where the disobedient person may be, with the request that the Consul make service of such order personally upon the disobedient person, and the Order to Show Cause (including the Court's direction in such Order for sequestration of the property) shall be published in some newspaper of general circulation in the district of the court issuing such order.

The Act does not require that the Order to Show Cause shall specify or shall be accompanied by a specification of the alleged offense or of the facts constituting the cause of action against the property, [illegible] a description of the property to be sequestered (S[illegible]). If the Consul should be unable to make personal service of the Order to Show Cause, "publication only" is relied upon to support the punitive procedure (Act, Sec. 8).

On the return day of the Order to Show Cause, the trial shall proceed whether or not the property-owning person to whom the order was directed is present, whether or not he waived his presence, whether or not he received actual notice of the offense charged; and if it shall be proved that he did not obey the witness-subpoena, he shall be adjudged guilty of contempt and shall be fined not to exceed $100,000,—the fine, unless paid, to be satisfied out of the sequestrated property (Act, Sec. 7 and 8). *Since the Order to Show Cause does not issue until after the Marshal has seized property, there is no provision in the Act for punishing disobedient non-property owning persons (Act., Sec. 6).*

Where there has been a judgment of guilty of criminal contempt of court, and defendant's property has been ordered sold to pay the fine "on service by publication only", defendant may come in within one year, if he should happen to learn of what has happened, and open the judgment for answer in the manner provided in Section 57 of the Judicial Code, relating to *in rem* actions. It is not clear what bearing the *in rem* questions raised by answer under Section 57 of the Judicial Code could have on the personal judgment of guilty of criminal contempt of court.

A copy of the Act is annexed hereto.

* * * * *

Procedure in 5131.

On May 13, 1927, special counsel herein, and the then District Attorney for the District of Columbia filed a petition with the Supreme Court of the District of Columbia (which for more convenient reference we shall hereinafter refer to as "the trial court") in which they averred that they "believed" that petitioner could testify to certain facts at the trial of the Sinclair-Fall criminal

case which had already been set for trial for October 17, 1927 (R., 5131, pp. 1-3).

On the same date, May 13, 1927, the trial court granted an order directing the issuance of the subpoenas prayed for; directing that they command petitioner to be and appear in Criminal Court No. 2 on October 17, 1927; that the subpoenas be addressed to any Consul of the United States in the Republic of France, or elsewhere, and that the sum of $500 be tendered petitioner for "travelling expenses" and for "attendance" at Court (R., 5131, pp. 3-4).

The resulting subpoenas later served on petitioner were in the traditional form of witness-subpoenas issued in behalf of the Government in criminal cases in United States courts, and contained no reference to the Act in question (R., 5131, pp. 7, 10).

On May 27, 1927, one of the subpoenas was served on petitioner "at his usual residence in Paris, France," by George Orr, a Consul of the United States in that City, and at the time of service Consul Orr tendered petitioner the sum of $500 for "travelling expenses". Nothing was said about "attendance" expenses (R., 5131, p. 8). On June 7, 1927, another such subpoena was served on petitioner at Paris, France, by Raymond Davis, also a Consul of the United States in said City, and at the time of this service Consul Davis tendered petitioner the sum of $500 without any explanation of its purpose (R., 5131, pp. 9-10). Petitioner refused both said tenders (R., 5131, pp. 8-10).

Neither Consul Orr nor Consul Davis informed petitioner that the subpoenas or the tenders were by authority of the Act (R., 5131, pp. 8-10).

The Sinclair-Fall trial commenced on October 17, 1927, and ended as a mistrial on November 2, 1927 (R., 5131, pp. 45, 50, 75).

At the commencement of the mistrial and after petitioner had been called and did not answer, Nathan L.

Miller and George Gordon Battle, Counsel for petitioner, appeared specially in his behalf and stated to Mr. Justice Siddons, presiding, that petitioner did not desire even to appear to flout or be disrespectful of the process of the Court, and attempted to state why petitioner was not present. The explanation was not permitted (R., 5131, pp. 10-11).

Responsive to the petition of Special Counsel herein, *copy of which was not served* on petitioner (R., 5131, pp. 4-7, 12, 13), the trial court on November 16, 1927, issued the Order to Show Cause. Without specifying a single fact constituting an offense, or a cause of action against petitioner's property, the order cited petitioner to appear on a certain date and show cause why he should not be adjudged guilty of contempt and be punished accordingly. The order also directed the seizure of undescribed property of petitioner of the value of $100,000.00, the service on him of a copy of the order, and publication of the order in the Washington Evening Star (R., 5131, pp. 11-12).

On November 19, 1927, the United States Marshal at Washington, D. C., levied upon and seized United States First 3½% Liberty bonds of petitioner of the par value of $100,000 (R., 5131, pp. 12-14). A copy of the Order to Show Cause was subsequently published in the Washington Evening Star (R., 5131, p. 14). It was not published in the Washington Law Reporter as required by Law Rule 19, para. 4, of the Supreme Court of the District of Columbia (R., 5131, pp. 49, 52).

On December 5, 1927, Consul George Orr served a copy of the Order to Show Cause on petitioner at his residence in Paris, France (R., 5131, pp. 12, 13).

Petitioner thereafter appearing specially by his attorneys filed a motion in the trial court to vacate and set aside the Order to Show Cause of November 16, 1927, and all proceedings pursuant thereto on the ground that the trial court did not have jurisdiction over petitioner

or of the proceeding because the Act violated the Fourth, Fifth, Sixth and Eighth amendments of the Constitution of the United States. This motion was made upon the proceedings theretofore had in the matter and upon the affidavit of George Gordon Battle, annexed thereto, which was later supplemented by affidavit of petitioner (R., 5131, pp. 16-19). These affidavits were uncontroverted and were to the effect that petitioner had resided abroad continuously since 1924. The motion to vacate and set aside, after argument, was overruled (R., 5131, pp. 33, 34).

Thereafter, petitioner, under protest and reserving his prior special appearance, filed certain pleas upon which the United States joined issue or demurred (R., 5131, pp. 34-52).

The identical Liberty Bonds of petitioner seized in this case (R., 5131) were, on January 7, 1929, again independently levied upon and seized by the United States Marshal at Washington, D. C., in connection with the proceedings in 5132 (R., 5131; p. 75).

* * * * *

Procedure in 5132.

On January 9, 1928, special counsel herein and the then District Attorney for the District of Columbia filed a petition in the trial court in which they averred that they "believed" that petitioner could testify to certain facts at the retrial of the Sinclair-Fall criminal case which had been set for April 2, 1928 (R., 5132, pp. 1-3).

In response to the petition of January 9, 1928, and on the same date, the trial court directed the issuance of the subpoenas prayed for, directed that they command petitioner to be and appear before said Court in Criminal Court No. 2 thereof on April 2, 1928, and that they be addressed to any Consul of the United States in the Republic of France or elsewhere, and that the sum of

$500 be tendered petitioner for "travelling expenses" and for "attendance" at Court (R., 5132, pp. 3-4).

The resulting subpoena for petitioner was again in the traditional form of witness-subpoenas issued in behalf of the Government in criminal cases in United States courts, and contained no reference to the Act (R., 5132, p. 8).

On February 1, 1928, this subpoena was served on petitioner in Paris, France, by Consul George Orr, and at the time of the service Consul Orr tendered petitioner the sum of $500 without any explanation of its purpose. Petitioner refused the tender.

Consul Orr did not inform petitioner that the subpoena or the tender was by authority of the Special Act in question (R., 5132, p. 9).

The Sinclair-Fall case was not called for trial on April 2, 1928, the date set in the subpoena; and on April 2, 1928 there were no proceedings in the case of any kind. Prior to April 2, 1928, and without notice to petitioner, the trial had been postponed to April 4, 1928, and later to April 9, 1928. Petitioner had received no subpoena or other command to attend the Court on April 4, 1928, or April 9, 1928 (R., 5132, pp. 8, 62-69). At the commencement of the trial on April 9, 1928, petitioner was called and did not answer (R., 5132, pp. 7, 26-27).

Responsive to a petition of July 6, 1928, of Special Counsel herein, *copy of which was not served on petitioner* (R., 5132, p. 14), an Alias Order to Show Cause was issued on December 26, 1928 (R., 5132, pp. 11-12). It cited petitioner to appear on a certain day and show cause why he should not be adjudged guilty of contempt of Court in neglecting, failing and refusing to obey "the subpoena heretofore issued by said Court and served upon him (petitioner) to appear before the Court as a witness in the case of the *United States* v. *Harry F. Sinclair and Albert B. Fall,* Criminal No. 43324, the circumstances of which are very fully set out in said motion

(the petition of July 6, 1928 above referred to) of plaintiff filed herein * * *" (R., 5132, p. 11). (Our parenthesis.)

The subpoena referred to, since petitioner did not receive a copy of the motion (the petition of July 6, 1928), might have been any one of the three subpoenas previously served in connection with the mistrial and retrial of the Sinclair-Fall case. The Alias Order to Show Cause also contained directions respecting the seizure of undescribed property of petitioner, directions for its publication in the Washington Evening Star, and for service of a copy upon petitioner (R., 5132, pp. 11-12).

On January 7, 1929, by virtue of said Alias Order the United States Marshal in Washington, D. C., levied upon and seized and took into his custody United States First 3½% Liberty Bonds of petitioner of the par value of $100,000 (R., 5132, pp. 12-14). These were the same bonds which the Marshal had previously levied upon and seized pursuant to a similar order in 5131, then pending against petitioner and growing out of the Sinclair-Fall mistrial (R., 5132, pp. 30, 32, 33, 41; R., 5131, p. 75).

A copy of the Alias Order to Show Cause was subsequently published in the Washington Evening Star (R., 5132, p. 12). It was not published in the Washington Law Reporter as required by Law Rule 19, para. 4, of the Court below (R., 5132, pp. 30, 33). On January 21, 1929, Consul George Orr served a copy of the Alias Order to Show Cause on petitioner at Paris, France (R., 5132, p. 14).

Petitioner thereafter appearing specially by his attorneys filed a motion in the Court below to vacate and set aside the Alias Order to Show Cause of December 26, 1928, and all proceedings pursuant thereto, on the ground that the Court did not have jurisdiction of petitioner, or of the proceedings, because the Act violated the Fourth, Fifth, Sixth and Eighth amendments of the Constitution of the United States. This motion was made

upon the proceedings theretofore had in the matter and upon the annexed affidavits of George Gordon Battle and of the petitioner. These affidavits were uncontroverted and were to the effect that petitioner had resided abroad continuously since 1924 (R., 5132, pp. 16-19). The motion to vacate and set aside was overruled (R., 5132, p. 21).

Thereafter, appellant, under protest, and reserving prior special appearance, filed certain pleas upon which the United States joined issue or demurred (R., 5132, pp. 21-35).

* * * * * *

Procedure Common to 5131 and 5132.

On September 16 and 17, 1929, a trial and a hearing were had in the Supreme Court of the District of Columbia on the Order to Show Cause of 5131, and the Alias Order to Show Cause in 5132, and the pleadings then before the Court.

At the outset and in both cases, counsel for petitioner objected to any testimony being received in the absence of petitioner, but the objection was overruled and exceptions taken (R., 5131, p. 73; R., 5132, p. 57). In both cases, after the testimony was in, and prior to the decision of the Court, counsel for petitioner objected to judgment in his absence. The objection was overruled and exceptions taken (R., 5131, p. 84; 5132, p. 81).

Petitioner, in both cases, moved for judgment on the pleadings and proceedings on various grounds (R., 5131, pp. 52, 72, 73, 74, 84; R., 5132, pp. 35, 56, 60, 80). These motions were overruled and exceptions taken (R., 5131, pp. 72, 74, 84; R., 5132, pp. 56, 57, 60, 80, 81).

Proceedings were had and rulings made by the Court and exceptions taken and allowed, on behalf of petitioner (R., 5131, pp. 72-86; R., 5132, pp. 56-82).

The Court, in each case, adjudged petitioner guilty of contempt of Court, and directed that he be fined $30,000

and costs (Total $60,000 and costs), to which exceptions were taken (R., 5131, p. 85; R., 5132, p. 81).

By consent a supersedeas bond was fixed in each case in the sum of $1,000, and pending appeal to the Court of Appeals of the District of Columbia, the Liberty Bonds levied upon by the United States Marshal remained *in custodia legis* (R., 5131, p. 85; R., 5132, p. 81).

Appeals to the Court of Appeals of the District of Columbia from the judgments of the trial court in each case were perfected by petitioner and were docketed in that court as No. 5131, and No. 5132.

Both cases were heard by the Court of Appeals of the District of Columbia on February 3d and 4th, 1931, and judgments were entered by that court on April 6th, 1931, affirming the decrees and judgments in both cases of the Supreme Court of the District of Columbia (R., 5131, pp. 107-108; R., 5132, pp. 103-104).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. The constitutionality of the Act has never been passed on by this court.

2. The Act is without precedent in that:

(a) In the absence of and without contemplating covering treaties, it authorizes the service of process of Federal Courts "beyond the jurisdiction of the United States" on United States citizens, and on aliens abroad who are domiciled in the United States, and makes it a criminal offense to disobey subpoenas so served;

(b) It authorizes *quasi in rem* procedure (attachment of property and publication) to acquire jurisdiction for Federal Courts to try an issue *in personam*—the issue of "recusancy",—and to render a judgment *in personam*—guilty or not guilty of criminal contempt of court;

(c) It authorizes trial and judgment of a criminal offense—criminal contempt of court—in the entire absence of the accused and without waiver of his presence, and, in some cases, without actual notice to him of his offense or of the claim against his sequestered property, "on publication only";

(d) It authorizes attachment of property to secure a possible fine in a future proceeding where the presumption of innocence obtains, and which does not involve the trial of a money claim or questions of "offending" property;

(e) It makes the ownership of "non-offending" property a condition precedent to punishment for a personal criminal offense—criminal contempt of

court—and without limiting the operation of the Act to property owners.

3. The law of these cases, dealing with basic conceptions of jurisdiction, and other first principles, is of the greatest importance, and should be finally settled to avoid confusion and uncertainty.

4. The Court of Appeals of the District of Columbia decided questions of general importance, and questions of substance relating to the construction and application of the Constitution, and of a statute of the United States (the Act), which have not been, but should be settled by this court, and that court did not give proper effect to applicable decisions of this court, in the following respects:

(a) In holding that under the authority of the Act, but without the authority of a treaty, a witness-subpoena, issued by a federal court, is valid although served in France (or in any other sovereign foreign nation), by a United States Consul of that country, upon a citizen of the United States, and that due process under the Fifth Amendment of the Constitution is not thereby violated. (R., 5131, pp. 96, 107-108; R., 5132, pp. 92, 103-104).

(b) In holding that the proceedings authorized by the Act occurring after the failure of the desired witness to obey the subpoena are *quasi in rem*, and that the judgment of contempt of court binds nothing but the property sequestered to satisfy the fine, and that due process under the Fifth Amendment of the Constitution is not thereby violated. (R., 5131, pp. 99, 107-108; R., 5132, pp. 95, 103-104).

(c) In holding that when reasonably construed, the Act does not contemplate or authorize an unreasonable search and seizure of property in vio-

lation of the Fourth Amendment of the Constitution. (R., 5131, pp. 100, 107-108; R., 5132, pp. 96, 103-104).

(d) In holding that the Act does not deny to defendants in criminal prosecutions the right to extra-territorial subpoenas, and hence the Act does not violate that part of the Sixth Amendment of the Constitution providing that the accused in such cases shall have compulsory process for obtaining witnesses in his favor, and in holding that petitioner had no right to raise the point. (R., 5131, pp. 100, 107-108; R., 5132, pp. 96, 103-104).

(e) In holding that the Act is not arbitrary, capricious, unreasonable, indefinite and uncertain, and therefore does not violate the guaranty of due process under the Fifth Amendment of the Constitution (R., 5131, pp. 101, 107-108; R., 5132, pp. 97, 103-104).

5. In failing to pass upon the contention of petitioner (R., 5131, pp. 99, 107-108; R., 5132, pp. 95, 103-104) that the provisions of the Act for hearing and judgment in the entire absence of the accused, who has not waived his presence, violate due process under the Fifth Amendment of the Constitution, the Court of Appeals of the District of Columbia failed to give proper effect to applicable decisions of this court.

6. In failing to pass upon the contention of petitioner that the Act does not require actual or any other notice to defendant of the offense or of the facts constituting the Government's claim against defendant's property, and hence violates the guaranty of due process under the Fifth Amendment of the Constitution (R., 5131, pp. 67, 68; assignments Nos. 1, 2, 5, 7; R., 5132, pp. 51-52, assignments Nos. 1, 2, 4, 11), the Court of Ap-

peals of the District of Columbia failed to give proper effect to applicable decisions of this court.

7. In holding that under the authority of the Act, but without the authority of a covering treaty, witness-subpoenas, and orders to show cause, issued by a federal court may be served validly in France (or in any other sovereign foreign nation) by a United States Consul in that country (R., 5131, pp. 96, 107-108; R., 5132, pp. 92, 103-104), the Court of Appeals of the District of Columbia decided a question of general importance and substance relating to the construction and application of the consular treaties between the United States and France and between the United States and all other nations, and did not give proper effect to applicable decisions of this court.

* * * * * *

We save the following procedural points with the thought and respectful suggestion that when an act is confessedly special, is designed to reach one or two selected citizens, and is passed in a period of national excitement, this court will serve the interests of justice by reviewing whether such an act has been fairly applied to those on whom it was specially designed to operate.

8. The Court of Appeals of the District of Columbia decided questions of general importance, questions of substance relating to the construction and application of the Constitution, and of a statute of the United States (the Act), which have not been, but should be settled by this court, and that court did not give proper effect to applicable decisions of this court, in the following respects:

(a) in holding that the subpoenas directed to petitioner were issued upon "proper showing" as required by *Section 2* of the Act (R., 5131, pp. 102, 107-108; R., 5132, pp. 98, 103-104);

(b) in holding that the Act does not and need not require the subpoenas to contain notice that they issued under the authority of the Act (R., 5131, pp. 102, 107-108; R., 5132, pp. 98, 103-104);

(c) in holding that petitioner received notice of the alleged offense and of the claim against his property, and that the introduction at the trials, by his counsel, of evidence in extenuation and mitigation amounted to a general appearance and deprived petitioner of the right to challenge the sufficiency of the notice. (R., 5131, pp. 98, 107-108; R., 5132, pp. 94, 103-104);

(d) in holding that the seizure in 5132 of the same property which had already been seized in 5131 did not work an abandonment of the first seizure (R., 5131, pp. 103, 107-108; R., 5132, pp. 99, 103-104);

(e) in holding that the subpoena in 5132 commanding the appearance of petitioner on April 2, 1928, was a valid command to appear on April 9, 1928, there having been no proceedings on April 2, 1928 (R., 5131, pp. 103, 107-108; R., 5132, pp. 99, 103-104)—and that due process under the Fifth Amendment of the Constitution was not violated in any of the foregoing matters.

WHEREFORE, your petitioner respectfully prays that writs of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the District of Columbia, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, full and complete transcripts of the records and all proceedings in these cases, numbered and entitled on the docket of said Court of Appeals, No. 5131 and No. 5132, Harry M. Blackmer, appellant, *vs.* United States, appellee, and that

the said causes be certified to this Honorable Court for determination by it with like effect as if the causes had been brought to this Honorable Court by unrestricted writ of error or appeal, and that the judgments therein of the said Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HARRY M. BLACKMER,

By: GEORGE GORDON BATTLE,
KARL C. SCHUYLER,
EUGENE D. MILLIKIN,
FREDERICK DE C. FAUST,
CHARLES F. WILSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

The Opinions of the Court Below.

The opinion of the Court of Appeals of the District of Columbia has not been reported. It is dated April 6, 1931, and is copied in the record. (R., 5131, pp. 88-107; R., 5132, pp. 84-103).

II.

Jurisdiction.

1. Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (U. S. C. Tit. 28, Sec. 347).

2. The date of the judgments to be reviewed is April 6, 1931. (R., 5131, pp. 107-108; R., 5132, pp. 103-104).

III.

Statement of the Case.

A full statement of the case has been given under A in the Petition, and in the interest of brevity, the statement is not repeated at this point.

IV.

Specification of Errors.

1. The Court of Appeals of the District of Columbia erred in finding and holding that under the authority of the Act, but without the authority of a treaty, a witness-

subpoena, issued by a federal court, is valid although served in France (or in any other sovereign foreign nation), by a United States consul of that country, upon a citizen of the United States, and that due process under the Fifth Amendment of the Constitution is not thereby violated. (R., 5131, pp. 96, 107-108; R., 5132, pp. 92, 103-104).

2. The Court of Appeals of the District of Columbia erred in finding and holding that the proceedings authorized by the Act occurring after the failure of the desired witness to obey the subpoena are *quasi in rem*, and that the judgment of contempt of court binds nothing but the property sequestered to satisfy the fine, and that due process under the Fifth Amendment of the Constitution is not violated. (R., 5131, pp. 99, 107-108; R., 5132, pp. 95, 103-104).

3. The Court of Appeals of the District of Columbia erred in finding and holding that when reasonably construed the Act does not contemplate or authorize an unreasonable search and seizure of property in violation of the Fourth Amendment of the Constitution. (R., 5131, pp. 100, 107-108; R., 5132, pp. 96, 103-104).

4. The Court of Appeals of the District of Columbia erred in finding and holding that the Act does not deny to defendants in criminal prosecutions the right to extra-territorial subpoenas, and hence the Act does not violate that part of the Sixth Amendment of the Constitution providing that the accused in such cases shall have compulsory process for obtaining witnesses in his favor, and in holding that petitioner had no right to raise the point. (R., 5131, pp. 100, 107-108; R., 5132, pp. 96, 103-104).

5. The Court of Appeals of the District of Columbia erred in finding and holding that the Act is not arbitrary, capricious, unreasonable, indefinite and uncertain, and therefore does not violate due process under the Fifth Amendment of the Constitution. (R., 5131, pp. 101, 107-108; R., 5132, pp. 97, 103-104).

6. The Court of Appeals of the District of Columbia erred in failing to find and hold that the provisions of the Act for hearing and judgment in the entire absence of the accused, who has not waived his presence, violate due process under the Fifth Amendment of the Constitution. (R., 5131, pp. 99, 107-108; R., 5132, pp. 75, 103-104).

7. The Court of Appeals of the District of Columbia erred in failing to find and hold that the Act does not require actual or any other notice to defendant of the offense or of the facts constituting the Government's claim against defendant's property, and hence violates due process under the Fifth Amendment of the Constitution. (R., 5131, pp. 67, 68, assignments Nos. 1, 2, 5, 7; R., 5132, pp. 51-52, assignments Nos. 1, 2, 4, 11).

8. The Court of Appeals of the District of Columbia erred in finding and holding that under the authority of the Act, but without the authority of a covering treaty, witness-subpoenas (and orders to show cause), issued by a federal court, may be served validly in France (or in any other sovereign foreign nation) by a United States consul of that country without violating due process under the Fifth Amendment of the Constitution. (R., 5131, pp. 96, 107-108; R., 5132, pp. 92, 103-104).

9. The Court of Appeals of the District of Columbia erred in finding and holding that the subpoenas directed to petitioner were issued upon "proper showing" as required by *Section 2* of the Act (R., 5131, pp. 102, 107-108; R., 5132, pp. 98, 103-104); that the Act does not and need not require the subpoenas to contain notice that they issued under the authority of the Act (R., 5131, pp. 102, 107-108; R., 5132, pp. 98, 103-104); that petitioner received notice of the alleged offense and of the claims against his property, and that the introduction at the trials by his counsel of evidence in extenuation and mitigation amounted to a general appearance and deprived petitioner of the right to challenge the sufficiency of the notices (R., 5131, pp. 98, 107-108; R., 5132, pp. 94, 103-104); that the seizure in 5132 of the same property which had already been seized in 5131 did not work an abandonment of the first seizure (R., 5131, pp. 103, 107-108; R., 5132, pp. 99, 103-104); that a subpoena under the Act commanding the appearance of petitioner on April 2, 1928, was a valid command to appear on April 9, 1928, there having been no proceedings on April 2, 1928, (R., 5131, pp. 106, 107-108; R., 5132, pp. 99, 103-104),—and that due process under the Fifth Amendment of the Constitution was not violated in any of the foregoing matters.

V.

ARGUMENT.

Summary of Argument.

POINT A. The provision of the Act authorizing service of a witness-subpoena "beyond the jurisdiction of the United States" is null and void and violates due process under the Fifth Amendment of the Constitution. Congress has no power to authorize United States Consuls to serve process except as permitted by treaty.

POINT B. The Act does not provide a valid method of acquiring judicial jurisdiction to render personal judgment against defendant and judgment against his property, hence all proceedings authorized by the Act leading to judgment against the person and property of defendant, the judgment itself and all subsequent proceedings authorized by it are void and violate due process under the Fifth Amendment of the Constitution.

POINT C. The Act does not require actual or any other notice to defendant of the offense or of the Government's claim against his property, and hence violates due process under the Fifth Amendment of the Constitution.

POINT D. The search and seizure of property authorized by the Act is an unreasonable search and seizure in violation of the Fourth Amendment.

POINT E. The provisions of the Act for hearing and judgment in the entire absence of the accused and without his consent violate due process under the Fifth Amendment of the Constitution.

POINT F. By excluding defendants in criminal prosecutions from the right to extra-territorial subpoenas, the Act violates that part of the Sixth Amendment of

the Constitution providing that the accused in such actions shall have compulsory process for obtaining witnesses in his favor.

POINT G. The Act violates due process under the Fifth Amendment of the Constitution because it is arbitrary, capricious and unreasonable.

POINT H. The procedure against petitioner violates due process under the Fifth Amendment of the Constitution in each of the following respects, to wit:

(a) The witness-subpoenas directed to petitioner, not having issued upon proper showing, were invalid and therefore all subsequent proceedings based on the invalid witness-subpoenas were likewise invalid; (b) the omission from the subpoenas (not otherwise supplied) of notice that they issued under the Act deprived them of compulsory effect, and, therefore, deprived the court below of jurisdiction to punish failure to obey their commands; (c) petitioner did not receive notice of any offense or of facts constituting the Government's claim against his property; (d) levy and seizure of petitioner's property in 5131 was abandoned by the Government, and, therefore, jurisdiction of the person and property of petitioner was abandoned, and all proceedings in 5131 subsequent to issuance of the order to show c[redacted] are null and void; (e) petitioner was not subpoenaed to attend the trial court on April 9, 1928 to testify on behalf of the United States in the Sinclair-Fall trial (Criminal No. 43324) and hence all proceedings in 5132 against petitioner arising out of his alleged neglect and refusal to appear as a witness in said trial on said date are null and void.

POINT A.

The provision of the Act authorizing service of a witness-subpoena "beyond the jurisdiction of the United States" is null and void and violates due process under the Fifth Amendment of the Constitution. Congress has no power to authorize United States Consuls to serve process except as permitted by treaty.

The subpoena is process. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 622. It is a judicial command to appear (Act, Sec. 2); it is an assertion of power. *Michigan Trust Company* v. *Ferry,* 228 U. S. 346, 353. The only subpoenas authorized by the Act are those to be served in a "foreign country" and "beyond the jurisdiction of the United States." (Act, Secs. 1 and 2).

The laws of Congress cannot outreach the Constitution. *Hodgson* v. *Bowerbank,* 5 Cranch 303; *Downs* v. *Bidwell,* 182 U. S. 244; *Dorr* v. *U. S.,* 195 U. S. 138. This nation, under the Constitution, is an equal sovereignty, which (in the absence of covering treaties) cannot exercise power extra-territorially. *The Schooner Exchange* v. *McFaddon,* 7 Cranch 116. The adherence of the United States to the principle of equal sovereignty accords with International Law which holds that the dividing line between sovereignties is a territorial line. *Cooley's Constitutional Limitations* (8th Ed.) Vol. 1, pp. 3, 4.

The prohibition against extra-territorial exercise of judicial power applies to the states of the United States whether the attempted exercise of such power be directed toward a citizen of the state or toward an absent non-resident (alien). *McDonald* v. *Mabee,* 243 U. S. 90 (citizen); *Cooper* v. *Reynolds,* 10 Wall. 308 (citizen), reaffirmed in *Pennoyer* v. *Neff,* 95 U. S. 714; *Galpin* v. *Page,* 18 Wall. 350 (alien); *Minder* v. *Georgia,* 183 U. S. 559

(alien); *Harkness* v. *Hyde*, 98 U. S. 476 (alien); *Wilson* v. *Seligman*, 144 U. S. 41 (alien); *Bischoff* v. *Wethered*, 9 Wall. 812 (alien); *Roller* v. *Holly*, 176 U. S. 398 (alien). See also following "alien" cases: *Freeman* v. *Alderson*, 119 U. S. 185; *Overby* v. *Gordon*, 177 U. S. 214; *Brown* v. *Fletcher's Estate*, 210 U. S. 82; *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346; *Baker* v. *Baker*, 242 U. S. 394.

The prohibition applies to our federal courts—in favor of absent citizens of the United States, whether abroad or absent from a particular district. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619 (Op. by Mr. Justice Brandeis); *Toland* v. *Sprague*, 12 Peters 300 (action under Pennsylvania Foreign Attachment Act and Federal Conformity Act. Defendant, a citizen of the United States, resided at Gibraltar, Spain); *Picquet* v. *Swan*, 5 Mason 35 (C. C. U. S. Mass. Op. by Mr. Justice Story, 1848). (Under Mass. Foreign Attachment Act and Federal Conformity Act. Defendant, a citizen of the United States, resided at Paris.) The prohibition is applied by this nation to other nations (in the absence of treaty) attempting to exercise judicial power in the United States over their own citizens. *Glass* v. *The Sloop Betsey*, 3 Dallas 6. (Attempt by France to exercise admiralty jurisdiction through its consuls over its citizens in the United States). It applies to the Government as well as to private suitors. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 623, *supra*.

Jurisdiction *in personam* is "*acquired*" either by voluntary appearance, or service on the person within the territorial jurisdiction of the court. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619. See also to same effect—*Pennover* v. *Neff*, 95 U. S. 714; *Boswell* v. *Otis*, 9 How. 346; *In re Johnson*, 167 U. S. 120; *McDonald* v. *Mabee*, 243 U. S. 90; *Herndon* v. *Ridgway*, 17 How. 424; *Michigan Trust Company* v. *Ferry*, 228 U. S. 346; *Baker* v. *Baker*, 242 U. S. 394; *Goldey* v. *Morning News*, 156 U. S. 518; *Insurance Company* v. *Bangs*, 103 U. S. 435; *Gal-*

pin v. *Page,* 18 Wall. 350; *Wilson* v. *Seligman,* 144 U. S. 41.

It follows that extra-territorial service of process, service "beyond the jurisdiction of the United States", is invalid and violates due process. *Pennoyer* v. *Neff,* 95 U. S. 714. The subpoena being invalid, the court is without jurisdiction and the order punishing for contempt is void. *Ex parte Fiske,* 113 U. S. 713. See also *U. S.* v. *Shipp,* 203 U. S. 563; *Ex parte Rowland,* 104 U. S. 604; *In re Sawyer,* 124 U. S. 200.

The court below took the position (R. 5131, p. 95; R. 5132, p. 91) that the duty of allegiance validates the extra-territorial service of process. We respectfully suggest that the duty of "allegiance" exists in the United States,—exists at Cleveland, Ohio, where a citizen of the United States, residing in that city was permitted by this court to disobey the subpoena of a United States court, because it had been served extra-territorially. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, *supra.* The analogy comes closer when it is noted that Robertson's testimony was wanted by an agency of the government engaged in investigating transportation problems of great importance which were then vexing the nation.

Allegiance as a doctrine to destroy territorial limits on the exercise of power, was squarely presented to and repudiated by this court. *McDonald* v. *Mabee,* 243 U. S. 90 (Op. by Mr. Justice Holmes). The question was whether extra-territorial service of process, under the laws of Texas, was valid to bind Mabee (who was absent from the state with the intention of not returning, but who had not given up his Texas citizenship) to a judgment *in personam.* The position of Mabee was summarized to this court by his counsel, including the late Senator Joseph W. Bailey, as follows:

> "In conclusion we respectfully submit that Mabee, the Defendant in Error here, and the De-

> fendant in the original Cause No. 5468, being a citizen of Texas and resident in Texas, charged with a knowledge of the laws of Texas, submitting himself, his family and his property to the laws of Texas, entitled to the protection of these laws, enjoying the rights, privileges and immunities which they safeguarded, thereby became amenable to such laws and accepted and agreed to their provisions for substituted service of process in each and every respect provided by the Statutes. He was not a citizen of another state and therefore needed no protection against the laws of his own state. Whether absent from the state, his residence therein unknown, or a transient person within the state, he had consented to and could lawfully be served with process by publication which would support a personal judgment against him." (p. 7, Brief for Defendant in Error, Vol. 57, collected briefs.)

To same effect see *Mabee* v. *McDonald*, 107 Tex. 139; 175 S. W. 676.

This court, however, rejected the doctrine and reemphasized (pp. 91-92) that the "foundation of jurisdiction is physical power"; that substituted service must keep the foundation in mind. The same thought was expressed, also by Mr. Justice Holmes, in *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346:

> "(p. 353) Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required,
>
> [Note: The power to seize (the basis of jurisdiction) is 'asserted by service']
>
> we dispense with the necessity of maintaining the physical power, and attribute the same force to the judgment or decree, whether the party remain

within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute."

See also to same effect—*Ex parte Indiana Transportation Company, petitioner,* 244 U. S. 456 (Op. by Mr. Justice Holmes).

The court below views the subpoenas as mere notices of pre-existing jurisdiction *in personam* (R., 5131, p. 96; R., 5132, p. 92). This is the very theory repudiated by *McDonald* v. *Mabee, supra,* and by all the cases hereinbefore cited to the effect that jurisdiction *in personam* must be *"acquired"*, and that service of process is an assertion of power.

The court below cited *U. S.* v. *Bowman,* 260 U. S. 94; *U. S.* v. *Bennett,* 232 U. S. 299 and *Cook* v. *Tait,* 265 U. S. 47 (R., 5131, pp. 95-96; R., 5132, pp. 91-92), to the point that Congress has power to pass laws prescribing phohibitions on conduct of United States citizens abroad, and to the point that taxes may be collected from our citizens even though they and the sources of their incomes are abroad. The cases are not applicable for the reason that the laws with which they deal do not pretend to authorize the exercise of extra-territorial power by our Government. No sheriff or tax collector goes abroad to exert power on the citizen. The exercise of governmental power authorized by such legislation is confined exclusively to the United States. The thought was emphasized in *Rose* v. *Himely,* 4 Cranch 241 (Op. by Chief Justice Marshall); *U. S.* v. *Rodgers,* 150 U. S. 249 (Op. by Mr. Justice Field); *The Hamilton,* 207 U. S. 398 (Op. by Mr. Justice Holmes) and *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347 (Op. by Mr. Justice Holmes).

The court below said (R., 5131, p. 96; R., 5132, p. 92)—"In *Bartue* and *Duchess of Suffolk's Case,* 2 Dyer's Rep., 176, b. 73 Eng. Reprint 383, and in *Knowles* v. *Luce,* Moore's Rep. #(K. B.) 109, 72 Eng. Reprint 473, it was held that at common law the sovereign has a right to re-

call the subject or citizen from abroad and may seize and forfeit all his property if he refuses to return." The ancient powers of the English Crown are not important here for the reason that at the time of the first Judiciary Act, and before that, American common law required that judicial jurisdiction *in personam* must be acquired by appearance, or service at a place where the serving officer had authority to execute a writ of summons. *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, *supra.* Moreover, the exercise of the right to recall is an executive or legislative function; it has never been claimed as a judicial right, and hence Congress, under the Constitution, could not confer it upon the Federal Judiciary. *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464; *Meyers, Administratrix* v. *U. S.* 272 U. S. 52. The Crown procedure in those ancient English cases, indeed, the procedure in the case at bar, savors of outlawry. The English common law doctrine of outlawry and that of the continental systems as to "civil death" violate the rudimentary conception of the fundamental rights of the citizen. *Hovey* v. *Elliott,* 167 U. S. 409, 444.

Lastly, there is the question whether in the absence of treaties authorizing such action, Congress has constitutional power to authorize United States consuls to serve subpoenas (and orders to show cause). Under the Act (Act, Sec. 3), and giving effect to the principles already observed, it would seem clear that there is no such power. But in addition there are special and specific prohibitions. This court held in *In re Ross,* petitioner, 140 U. S. 453 (p. 462) that "the Constitution can have no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority *of any kind* in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other." (Our italics.) And in *Dainese* v. *Hale,* 91 U. S. 13, it was expressly held that judicial powers cannot be exercised by consuls except by authority of treaty.

Under International Law consuls have no power except that conferred by treaty. *Wheaton's International Law* (8th Ed.) Sec. 110, pp. 176-177; *Hyde on International Law*, Vol. 1, pp. 460-462; *Moore: Report on Extra-territorial Crime and the Cutting Case* (Foreign Relations, 1887). Even the highly emergent right of a nation to proclaim the recall of its absent citizens in time of war does not break down the prohibition on the extra-territorial exercise of power. It cannot send its officers into other countries to round up absent citizens for return to service. *Crapo* v. *Kelly*, 83 U. S. 610.

We ask this court to take judicial notice that there are no treaties between this and other nations authorizing our consuls to serve witness-subpoenas.

POINT B.

The Act does not provide a valid method of acquiring judicial jurisdiction to render personal judgment against defendant and judgment against his property, hence all proceedings authorized by the Act leading to judgment against the person and property of defendant, the judgment itself and all subsequent proceedings authorized by it are void and violate due process under the Fifth Amendment of the Constitution.

Jurisdiction to punish is acquired under the Act by *quasi in rem* procedure (See opinion of court below, R., 5131, p. 99; R., 5132, p. 95). This also appears from the requirement of the Act that the marshal shall not take steps to publish and serve the order to show cause until after he has levied upon the property of the disobedient witness. (Act, Sec. 6).

The action is in fact in personam. Section 4 provides that if the person served with the subpoena shall neglect or refuse to appear, the court shall, upon proof

being made of the service and default, issue the order to show cause. *Section 7* provides that on the return day of the order to show cause, proof shall be taken; *and if the charge of "recusancy" against the witness shall be sustained,* the court shall adjudge him guilty of contempt, impose upon him a fine, and the amount thereof, unless paid, shall be satisfied out of defendant's attached property. The charge, therefore, is "recusancy"; the issue, therefore, is whether defendant is guilty or not guilty of "recusancy"; the trial is exclusively confined to that issue; the judgment is guilty or not guilty of contempt with fine, if guilty, to be satisfied, if not paid, out of defendant's attached property. It is a personal criminal offense—criminal contempt of court. *Michaelson* v. *U. S.*, 262 U. S. 42, 66, 67.

There is no charge, issue, trial or judgment as to "offending property". There is no charge, issue, trial or judgment as to money claims or property disputes. The action could not and does not assert a money claim against defendant on account of a possible fine, for the reason that the defendant in criminal contempt cases is presumed to be innocent. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450, 451; *Michaelson* v. *U. S.*, 262 U. S. 42, 66, 67. In other words, the defendant is presumed not to owe the Government fine money. Hence, the action is not *in rem* or *quasi in rem*. It is not until after the trial has been completed, and until after the personal judgment of guilty of criminal contempt against defendant has been decreed, that the fine, if unpaid, is ordered satisfied out of the attached property.

Quasi in rem methods of acquiring jurisdiction *in personam* where there is no voluntary appearance or service of process within the territorial jurisdiction of the court, violate due process. *Pennoyer* v. *Neff*, 95 U. S. 714. *Quasi in rem* procedure must necessarily contemplate a *quasi in rem* judgment. A *quasi in rem* judgment is one which to comply with due process affects nothing

but the property under attachment. No part of the judgment resulting from *quasi in rem* procedure may stand as an unsatisfied judgment *in personam* against defendant. *Insurance Co.* v. *Bangs*, 103 U. S. 435, 439; *Pennoyer* v. *Neff*, 95 U. S. 714, 730; *Cooper* v. *Reynolds*, 10 Wall. 308, 318; *Cooley's Constitutional Limitations* (8th ed.) vol. 2, pp. 851-856.

When the *quasi in rem* procedure of the Act has run its course, there remains unsatisfied and outstanding in perpetuity the personal judgment against the defendant of guilt of the personal criminal offense—criminal contempt of court. As was developed in the preceding point (Point A), jurisdiction to render that kind of a judgment must be "acquired" by voluntary appearance or service within the territorial jurisdiction of the court (or by personal attachment).

Moreover, in federal courts, despite contrary legislation of Congress and contrary state practice, *quasi in rem* procedure is not used to acquire jurisdiction. In federal courts attachment is but an incident to a suit, and unless the court acquires jurisdiction over the person of the defendant by appearance or service of process within the court's territorial jurisdiction, the attachment must fall. *Toland* v. *Sprague*, 12 Pet. 300, 329; *Picquet* v. *Swan*, 5 Mason 35; *Big Vein Coal Co.* v. *Read*, 229 U. S. 31; *Laborde* v. *Ubarri*, 214 U. S. 173.

The court below cited *Big Vein Coal Co.* v. *Read*, *supra*, to sustain its contention that Congress may authorize *quasi in rem* procedure in contempt cases, picking up the following language of Justice Day in that case—"(229 U. S. 38) If Congress had intended any such radical change (a change of the settled rule that in order to issue an attachment the defendant must be subject to personal service or volnntarily appear in the action), it would have been easy to have made provision for that purpose, and doubtless a method of service by publica-

tion in such cases would have been provided." (Our parentheses).

That part of the opinion is *dictum*, but even if the language had direct bearing on the issues involved in that case, such "radical change" would have to be limited to defendants within the territory over which the United States exercises dominion, for otherwise it would precipitate an irreconcilable clash with the clearly established principle of due process that substituted service must keep close to the fact that "jurisdiction is power", is the power to seize (*McDonald* v. *Mabee*, 243 U. S. 90; *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346), and its corollary, that no state may exercise power within the territorial jurisdiction of another. Justice Day, moreover, was speaking of *quasi in rem* actions, not actions *in personam*.

The court below stated that contempt proceedings are *sui generis*. (R., 5131, p. 97; R., 5132, p. 93). We respectfully suggest that we are not concerned with *sui generis* proceedings, with contempt procedure under the general powers of federal courts, and with the attendant relaxations in the usual rules in connection with criminal offenses. We have for consideration express procedure under a special act of Congress in derogation of the common law which does not draw on the general powers of federal courts, which in fact is their antithesis, and which must be strictly construed according to its terms. *Galpin* v. *Page*, 18 Wall. 350.

If there is no jurisdiction to render the personal judgment of guilty of contempt of court, it follows there is no jurisdiction to sequester or sell the property, for those steps are entirely dependent upon the right to proceed to judgment on the issue of "recusancy".

POINT C.

The Act does not require actual or any other notice to defendant of the offense or of the Government's claim against his property, and hence violates due process under the Fifth Amendment of the Constitution.

The Act does not provide for notice of the charges or for notice of the claim against the sequestered property. (See Act). It provides for a bare citation to appear and show cause why the defendant should not be adjudged guilty of contempt, which citation may also contain notice (if the defendant is a property owner) that the court has directed attachment of undescribed property (Act, sections 4, 5, 6).

Congress drew the distinction, in contempt cases, between a bare citation to appear and show cause, and a notice of facts constituting an offense, when it enacted the following as a part of the Clayton Act. (U. S. C. Tit. 28, Sec. 387):

> "* * * which rule (rule to appear and show cause), *together with a copy of the affidavit of information, shall be served upon the person charged,* with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein." (Our italics).

See also *In re Rosser,* 101 Fed. 562 (C. C. A., 8th Circ. 1900, Op. by Circuit Judge Sanborn), approved in *In re Wood & Henderson,* 210 U. S. 246.

Special counsel for the Government in these cases interpreted the Act as not requiring notice to the defendant of his alleged offense or of the alleged claim against his property. In Case No. 5131, the only information served upon petitioner, or published, was contained in the order which confined itself to the arbitrary, utterly unsupported citation to appear and show cause why peti-

tioner should not be adjudged guilty of an undescribed contempt, and to notice that the court had ordered the attachment of undescribed property. (R., 5131, pp. 11-16; R., 5132, pp. 11-14).

In 5132 a similar order was served and published, except that the offense was stated to be "in neglecting, failing and refusing to obey *the subpoena* heretofore issued by said court and served upon him (petitioner.)" *The uncertainty and indefiniteness of the order in 5132 may be judged by the fact that when it issued, petitioner had already been served with three subpoenas involving two trials.* (R., 5131, pp. 7-10; R., 5132, pp. 8-9).

Whether the three subpoenas were served under the authority of the Act, or otherwise, did not appear in any publication or in any service upon petitioner. (R., 5131, pp. 7-10; R., 5132, pp. 4-5), and the Act does not require that such information shall appear. (See Act).

The Act is invalid, violating due process under the Fifth Amendment of the Constitution, because it does not provide that notice of the specific charges against the defendant and against his property shall be given. *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413.

POINT D.

The search and seizure of property authorized by the Act is an unreasonable search and seizure in violation of the Fourth Amendment.

Section 5 of the Act provides that the court may direct as a part of the order to show cause that the "property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct, shall be levied upon and seized by the Marshal of said court * * * to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted." *Section 7* of the Act provides for the sale

of the property to satisfy any unpaid fine and the costs of the proceedings.

There is no way for the Marshal to find the property except to search for it and there is no limitation upon the place of search.

The search and seizure under the Act are made:

A condition precedent to judgment in the purely personal criminal action—criminal contempt of court (Act, Secs. 6, 7, 8); prior to trial or conviction of the offense contemplated by the Act (Act, Secs. 6, 7, 8); while the presumption of innocence obtains (*Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418; *Michaelson* v. *U. S.*, 262 U. S. 42); without prior notice or hearing (Act, Sec. 5); without it being mandatory that defendant shall ever receive actual notice of or hearing on the seizure or final sale of the property (Act, Sec. 8); in the absence of personal jurisdiction over defendant (Act, Sec. 8); in the uncontrolled discretion of the court (Act, Sec. 5); without limitation as to the value of property seized, and at a time,—prior to trial and judgment, when it is impossible to establish a reasonable relationship between what is searched for and seized and what, if anything, will be required to satisfy the fine which the law presumes will not be adjudged (Act, Sec. 5); prior to the existence of any money claim against defendant, and in the absence of any property dispute or question of "offending" property (See Act).

All searches and seizures, whether or not for incriminating purposes, that "invade the sanctity of a man's home and the privacies of life", that invade his "indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense", and "whether accused of crime or not" violate the protection of the Fourth Amendment. *Boyd* v. *U. S.*, 116 U. S. 616; *Weeks* v. *U. S.*, 232 U. S. 383. We submit the search and seizure authorized by the Act, no matter how nicely it

may be executed by the Marshal, grossly offend the Fourth Amendment.

It is interesting to note that the Act, passed June 22, 1874, which was declared unconstitutional by the Supreme Court in the *Boyd* case, *supra*, had its origin in the acts of March 3, 1863 and March 2, 1867, both relating to customs matters. The Supreme Court (116 U. S. 616) said, on page 621:

> "It (the Act of 1863) was the first legislation of the kind that ever appeared on the statute books of the United States, and, as seen from its date, was adopted at a period of great national excitement. * * *" (Our parenthesis).

POINT E.

The provisions of the Act for hearing and judgment in the entire absence of the accused and without his consent violate due process under the Fifth Amendment of the Constitution.

Since the contempt originating under *Section 2* of the Act "is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions", it is criminal contempt of court. *Ex parte Grossman*, 267 U. S. 87, 111. Criminal contempt of court is a criminal offense. *Grossman* case, supra; *Michaelson* v. *United States*, 266 U. S. 42, 66-67.

Ex parte Terry, 128 U. S. 289, established that at least at some stage of the proceedings to punish for criminal contempt, the court must have jurisdiction *in personam* over the defendant. We can find no precedent for a trial of a defendant charged with criminal contempt in his entire absence and without his consent. Under general criminal law such course of action is, of course, unthinkable.

But the Act authorizes punitive procedure against defendants beyond the jurisdiction of the United States

when the alleged offense was committed, who were not subsequently attached, or served with summons within the United States; who may never have appeared in the court room, who may never have plead to the charge, who may never have consented to proceedings in their absence, who may never have received notice of an offense. (See Act).

This feature of the Act was given practical construction by special counsel for the Government for, in the present cases, petitioner was tried in his absence and over his protest, after he had reserved his special appearances. (R., 5131, pp. 40, 53, 73, 84; R., 5132, pp. 22, 36, 57, 81).

Mr. Justice Curtis, when on Circuit announced in *U. S.* v. *Mayo,* (Fed. Cas. No. 15754, 26 Fed. Cas. p. 1230), that a defendant in a misdemeanor case might be tried in his absence if, among other conditions, special power of attorney to appear and plead and defend in defendant's absence were filed in court by the attorney for the defendant. The Act does not provide for anything of that kind. See also *United States* v. *Shelton,* 6 Fed. (2d) 897.

The court below said (R., 5131, p. 99; R., 5132, p. 95): "It is not necessary, therefore, to determine whether Sec. 4 of the Act authorizes a personal judgment in the absence of the recusing witness nor whether the prescribed procedure would constitute due process. We are convinced that Congress would have authorized the procedure under Sec. 5 irrespective of Sec. 4." But Congress did not do that and could not have done that without gutting the Act of whatever sense there may be in it. *Section 5* is completely dependent on *Section 4.* What would the *quasi in rem* procedure provided by *Section 5* apply to if not to the offense of contempt provided in *Section 4?* There is no issue under the Act except the personal issue, guilty or not guilty of contempt.

POINT F.

By excluding defendants in criminal prosecutions from the right to extra-territorial subpoenas, the Act violates that part of the Sixth Amendment of the Constitution providing that the accused in such actions shall have compulsory process for obtaining witnesses in his favor.

The subpoena authorized by the Act which may issue out of criminal cases is exclusively a Government subpoena (Act, Sec. 2). *Section 1* of the Act providing for a subpoena to follow the failure of letters rogatory, relates to civil cases. *Rep. of House Committee on the Judiciary,* No. 1313, 69 Cong. 1st. Sess., May 26, 1926, pp. 1-3. See also remarks of Senator Walsh in introducing the bill which became the Act. *Cong. Rec.* vol. 67, part I, page 613.

Moreover, letters rogatory rest entirely on the offer of the tribunal making the request "to do the like" for the other in a similar case. *Greenleaf on Evidence* (Redfield's Ed.) Sec. 320. *Section 4071 of the Revised Statutes* (U. S. C. Tit. 28, Sec. 701) limits the case in which we will honor letters rogatory to a "suit for recovery of money or property." Since then we cannot "do the like" for others, we cannot ask that letters rogatory, assuming they are available in criminal cases, shall be honored. Furthermore, letters rogatory, resting as they do on comity, are not compulsory.

Petitioner attacks the constitutionality of the Act because *Section 2,* which limits the availability of the subpoena to the Government, and therefore offends the Sixth Amendment, also directly and adversely affects him. If *Section 2* did not exist, the Act would not affect him at all.

Cases like *Blair* v. *U. S.* 250 U. S. 273, and *U. S.* v. *Watson,* 266 Fed. 736, where grand jury witnesses at-

tacked the constitutionality of acts creating the offenses under investigation, obviously are not applicable here. This petitioner does not attack the constitutionality of the statutes under which Sinclair and Fall were prosecuted, nor the resolutions prompting the prosecutions, nor the grand jury investigations preceding them. Petitioner directly attacks the Act, and that part of it which directly and adversely affects him.

POINT G.

The Act violates due process under the Fifth Amendment of the Constitution because it is arbitrary, capricious and unreasonable.

The punitive provisions of the Act can only operate after attachment of property. (Act, Secs. 5, 6, 7). In other words, the Act makes the ownership of "non-offending" property a condition precedent to judgment of guilt of crime.

The Act can have no purpose (aside from its special motive) other than to secure testimony from "any citizen of the United States" or from any person "domiciled therein" "who is beyond the jurisdiction of the United States" and whose "attendance at the trial of any criminal action" "is desired by the Attorney General or any assistant or district attorney acting under him." (Act, sec. 2). Clearly, the richest or the poorest may have testimony of value in a criminal case, and our absentees abroad embrace all degrees of wealth and poverty.

For the Act not to be arbitrary, capricious and unreasonable, there must be reasonable relationship between the punishment for disobedience and those who can be disobedient. It must apply to rich and poor alike. There is no demagogue in the Constitution.

The attachment is made despite the fact that under the Act the property cannot be "offending"; it is made prior to trial and therefore prior to the time that the amount of the fine (if defendant should be found guilty) can possibly be estimated, unless it is to be assumed that the court shall act on hearsay, or on preconceived notions, or on *ex parte* advice.

In view of the presumption of innocence, the possibility of proved innocence, of highly mitigatory defense, of guilt without mitigation, there cannot possibly be a reasonable relationship between the authorized unlimited attachment and the result of the trial.

The attachment is made while the defendant is presumed innocent and is therefore presumed not to owe the government the fine money which the Act intends shall be secured by the attachment. *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418; 450, 451; *Michaelson* v. *United States*, 266 U. S. 42, 66, 67.

Arbitrary, unreasonable, caprjcious legislation violates due process under the Fifth Amendment of the Constitution. *The Bank of Columbia* v. *Okely*, 4 Wheat 235, 244; *Hurtado* v. *California*, 110 U. S. 516, 532; *Leeper* v. *Texas*, 139 U. S. 462; *Scott* v. *McNeal*, 154 U. S. 34; *Twining* v. *New Jersey*, 211 U. S. 78, 101.

PROCEDURAL POINTS.

Point H-(a)—Lack of Proper Showings for the Subpoenas.

Section 2 of the Act makes "proper showing" a condition precedent to the issuance of subpoenas under the Act. The alleged showings in these cases rest upon nothing more than a state of mind—a series of beliefs. "Your petitioners believe and therefore aver"—"because as your petitioners aver, they believe"—"your

petitioners believe and therefore aver". (R., 5131, pp. 1-3; R., 5132, pp. 1-2).

"A showing is that which is done to make apparent or clear by evidence, by proof", *Bouvier's Law Dictionary* (Baldwin's Library Ed.) 36 Cyc. 434: "beliefs" are not proof; they are not evidence. *Handford* v. *Duchastel* (Court of Errors and Appeals of N. J.) 93 Atl. 589; *Kennedy* v. *Chumar*, 26 N. J. L. 305. No proof, no evidence, no facts were before the trial court, and hence there was nothing before it upon which to exercise its discretion.

The provision for a proper showing is for the protection of the citizen and such provisions are not directory but mandatory, "they must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise." *French* v. *Edwards*, 13 Wall. 506.

There having been no "proper showing", the witness-subpoenas and the proceedings subsequent to their issuance, were invalid and purely arbitrary. Due process is not arbitrary process, it is in accord with settled principles, maxims and rules of law which govern society. *Cooley, Constitutional Limitations*, pp. 356. *Chicago & Ry. Co.* v. *Chicago*, 166 U. S. 226, 240; *Dartmouth College case*, 4 Wheat. 518, 581; *Bank of Columbia* v. *Okely*, 4 Wheat. 235.

Point H-(b)—Subpoenas Did Not Carry Notice of the Act.

At common law, it could not be contempt to disobey an extra-territorially served witness-subpoena. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619. The witness-subpoenas in these cases were all served upon petitioner at Paris, France. (R., 5131, pp. 7-10; R., 5132, pp. 4-5). Petitioner, therefore, might disregard their commands, —there could be no offense, unless they carried notice, or unless in some other way they were supplemented with

proper official notice that they had issued and had been served pursuant to the provisions of the Act in question.

The Government's proof of this element of its burden consisted in submission of the subpoenas and the returns of consuls serving them. The subpoenas and the returns carried no word of the Act. (R., 5131, pp. 7-10; R., 5132, pp. 4-5). Neither petitioner nor his counsel, looking at the subpoenas, or considering them in the light of their service or the tenders of money (R., 5131, pp. 8-10; 5132, p. 9) by the consuls, could tell that they had issued under authority of the Act, and since they were in the ordinary form of subpoenas, and since they were served extra-territorially, petitioner and his counsel were entitled to assume that, regardless of the existence of the Act, the testimony was being sought under the general powers of the court, and by that same token might be disregarded. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619.

A contempt action cannot be based upon a void subpoena. *Ex parte Fiske*, 113 U. S. 713. The subpoenas, because they were general and failed to carry notice of the Act did not give the court personal jurisdiction of petitioner, and without such personal jurisdiction it was a violation of due process to proceed against him. *Pennoyer* v. *Neff*, 95 U. S. 714; *Galpin* v. *Page*, 18 Wall. 350.

Point H-(c)—No Notice of Offense or of Claim Against the Property.

Under our point C we have already shown that the orders to show cause did not contain and were not supplemented with notice of petitioner's alleged offenses and the alleged claims against his attached property.

Petitioner never waived his right to notice. He protested the lack of notice before the trial commenced, at the conclusion of the Government's main case, and at the conclusion of the testimony (R., 5131, pp. 72, 74, 84; R., 5132, pp. 56, 59, 60, 80). The omissions of notice in the

orders to show cause was not otherwise supplied by the consuls in making their services or in any other authorized or official manner (See Record). The publication in the two cases was accomplished by the simple expedient of publishing copies of the orders to show cause (R., 5131, p. 14; R., 5132, p. 12).

It should be understood that we are not contending as to the "form" of notice. We protest the total lack of notice in any form. The informalities of procedure and varieties of method that may be permitted in bringing notice to defendants in criminal contempt actions do not eliminate the requirement of due process for notice of some kind, in some form, to defendants not charged with contempt "in the face of the court." *Cooke* v. *U. S.*, 267 U. S. 517. There can be no procedure against property without giving the owner notice of the claim. Failure to provide such notice violates due process. *Windsor* v. *McVeigh*, 93 U. S. 274.

The court below declared petitioner will not be permitted to challenge the sufficiency of the notice because evidence was introduced by his counsel in extenuation and mitigation (R., 5131, p. 98; R., 5132, p. 94). The contrary, however, has been well established by this court. See *Ex parte Indiana Transportation Company, Petitioner*, 244 U. S. 456; *Harkness* v. *Hyde*, 98 U. S. 476; *Munter* v. *Weil Corset Co.*, 261 U. S. 276, to the point that when objections to the jurisdiction have been overruled, the defendant does not lose his rights by pleading to the merits. The records in these cases abound with petitioners' objections to the jurisdiction, which were uniformly overruled (R., 5131, pp. 33-34, 72, 73, 74, 84; R., 5132, pp. 21, 35-42, 57, 60, 70, 80, 81).

Point H-(d)—Abandonment of Levy and Seizure in 5131.

The seizure of property is the basis of jurisdiction for the punitive procedure under the Act (Act, Sec. 6).

In each case the Marshal levied upon and seized the same Liberty bonds of petitioner (R., 5131, pp. 74-75). The seizure in 5132 of the same Liberty bonds which had already been seized and set aside in 5131 was not requested by special counsel for the Government (R., 5132, p. 7), was not authorized by the court (R., 5132, p. 11), and was not a seizure of an equity that might remain after satisfaction of any fine that might result in 5131. It was a separate, independent, physical seizure of the same bonds which had been levied upon, seized, set aside and dedicated to the security of 5131 (R., 5132, p. 12); and was therefore antagonistic to and inconsistent with the maintenance of the levy and seizure in 5131. A second antagonistic and inconsistent levy and seizure by the same party on the same property works an abandonment of the first levy and seizure. *Freeman on Executions,* Sec. 50; *Hermann on the Law of Executions,* p. 252; *Scott's Execs.* v. *Hill,* 6 N. C. 143; *Alley* v. *Carroll,* 35 Tenn. 110.

Furthermore, the Act, in derogation of the common law, which must be strictly construed, does not authorize successive levies upon and seizures of the same property. *Section 5* provides that the property seized shall "be held to satisfy any judgment against such witness in the proceeding *so instituted.*"—not successively instituted. It results that there was an abandonment of the levy and seizure (jurisdiction) in 5131 or there was nothing available to seize and levy upon—to establish jurisdiction—in 5132. To proceed without jurisdiction violates due process under the Fifth Amendment. *Pennoyer* v. *Neff,* 95 U. S. 714.

POINT H-(E)—IN 5132, PETITIONER WAS NOT SUBPOENAED TO ATTEND A TRIAL ON APRIL 9, 1928.

In 5132 petitioner was served with a subpoena which commanded his attendance at the Sinclair-Fall trial on Monday April 2, 1928 to testify on behalf of the United

States and not depart the court without leave of the court or district attorney (R., 5132, p. 8).

The Sinclair-Fall case was tried on April 9, 1928 (R., 5132, p. 7). Petitioner was not subpoenaed to attend a trial on April 9, 1928. On April 2, 1928 there were no proceedings of any kind in the Sinclair-Fall case. (R., 5132, p. 67).

The command of the subpoena "not to depart the court without leave of the court or district attorney", was gratuitous. The Act does not authorize it. The Act commands attendance at a trial at a time and place designated. (Act, Sec. 2). The offense under the Act is the failure to appear as "in such subpoena directed". (Act, Secs. 4 and 7). The Act is special, is in derogation of the common law and should be strictly construed in favor of the defendant. There was no offense in 5132, and hence no jurisdiction to punish. Proceedings without jurisdiction violate due process. *Pennoyer* v. *Neff*, 95 U. S. 714.

CONCLUSION.

It is therefore respectfully submitted that these cases call for the exercise by this Court of its supervisory powers, and that writs of certiorari should be granted and this Court should review the decisions in these cases of the Court of Appeals of the District of Columbia and finally reverse them.

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ANNEX.

THE ACT OF JULY 3, 1926.

(c. 762; 44 Stat. 835; U. S. C. tit. 28, Secs. 711 to 718, inc.)

711. (Sec. 1.) *Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena.*— Whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before the court issuing such letters, the court out of which said letters issued may upon proper showing order that a subpoena issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

712. (Sec. 2.) *Trial of criminal actions; witness beyond jurisdiction of United States; issue of subpoena addressed to consul in foreign country.*—Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or dis-

trict attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

713. (Sec. 3.) *Service of subpoena on witness in foreign country.*—It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpoena under this Act or at the request of the officer causing such subpoena to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpoena and supplied to the consul making the service.

714. (Sec. 4.) *Failure of witness to obey subpoena; order to show cause in contempt proceedings.*—If the witness so served shall neglect or refuse to appear as in such subpoena directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

715. (Sec. 5.) *Direction in order to show cause for seizure of property of witness in contempt.*— Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States) direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct, shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

716. (Sec. 6.) *Service of order to show cause.*—The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

717. (Sec. 7.) *Hearing on order to show cause; judgment; satisfaction.*— On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court gen-

erally to punish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

718. (Sec. 8.) *Opening judgment when rendered upon service by publication.*—Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer within the time and in the manner provided in section 57 of the Judicial Code.